IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 3RD DECEMBER 2007 / 12TH AGRAHAYANA 1929

Crl.Rev.Pet.No. 930 of 2006()

ST.4535/2003 of JFCM-I, PERINTHALMANNA

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REVN. PETITIONER: COMPLAINANT:

C. HAMZA, S/O. KUNHIKOYA,
CHITHALLOOR HOUSE, VALAMBUR P.O.,
PERINTHALMANNA.

BY ADV. SRI.A.MOHAMED MUSTAQUE
SRI.M.K.SUMOD

RESPONDENTS: ACCUSED/STATE:

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1. ANZIYA SAMAD, W/O. SAMAD,
LATHEEF MANZIL, THALACHIRA P.O.,
KOTTARAKARA, KOLLAM DISTRICT.

2. THE STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.P.RAVEENDRA BABU FOR R2
SRI.P.GOPAKUMARAN NAIR
SRI.C.S.DIAS
SRI.K.V.ANIL KUMAR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 03/12/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl.R.P.No. 930 of 2006

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Dated this the 3rd day of December, 2007

ORDER

This revision is filed by the complainant in a prosecution under Section 138 of the Negotiable Instruments Act, 1881, involving a cheque for Rs.1,15,000/-. The accused in the case is a woman who was examined as DW1. Her contention was one of total denial of having borrowed the sum of Rs.1,15,000/- as alleged by the complainant. In Ext.P6 reply to the statutory notice her contention was that her husband had borrowed a sum of Rs.50,000/- from the son of the complainant and later the complainant had forcibly and under duress obtained the cheque from the accused. The learned Magistrate who took the private complaint on file as S.T.No.4535 of 2003, after trial, found the 1st respondent/accused guilty of the offence and sentenced her to simple imprisonment till rising of the Court and directed her to pay a sum of Rs.55,000/- as compensation to the complainant under Section 357(3) Cr.P.C. and on default to pay the sum, she was directed to undergo simple imprisonment for a period of three months. It is the direction to pay the compensation which

is assailed in this revision by the complainant.

2. I heard the learned counsel appearing for revision petitioner-complainant and the learned counsel appearing for the 1st respondent -accused.

3. Admittedly the cheque is for an amount of Rs.1,15000/-. The compensation which the accused was directed to pay to the complainant was Rs.55,000/-. The reason given by the learned Magistrate for reducing the compensation as is discernible from the judgment obtained at paragraph 11 of the judgment reads as follows.

> "It is seen that the accused is in financial stringency and involved in debt trap. Under the above circumstances a compensation of Rs.55,000/-(Rupees fifty five thousand only) will be reasonable and sufficient in the facts and circumstances of this case"

4. The learned counsel appearing for the 1st respondent-accused sought to sustain the above direction contending, inter alia, that the said direction is fully in accord with the recent

decision of the Apex Court in **Dilip S Dahanukar v. Kotak Mahindra Co.Ltd and another** (2007(6) SCC 528) particularly in paragraph 27,35,37,38 and 39 thereof. He also placed reliance on the decision reported in **Anilkumar v.Shammy** (2002(3)KLT 852) and 2007(4) KLT 215 to contend for the position that the compensation awarded is reasonably fair and having regard to the involved circumstances in which the accused has been found to have been placed and that if at all the complainant wants to claim more, then his remedy is to approach the civil court. He also placed reliance upon the decision in **Lakshmana Prabhu v. Vidyasagaran and others** (1970 KLT 1093) to contend for the position that the revisional court will not interfere with the sentencing discretion exercised by the trial judge.

5. The sentence which the Court has to pass in a case should be commensurate with the gravity of the offence. But here the sentence is not commensurate with the offence or the quantum of compensation awarded to the complainant. No doubt, in the recent decision of the Apex Court in **Dilip S Dahanukar v. Kotak Mahindra Co.Ltd and another** (2007(6) SCC 528 it has

been observed that granting of compensation under Section 357 (3) is an additional power and before awarding compensation under the said provisions, the court has to take into account all the relevant factors in mind. The Apex Court has further observed that before issuing the direction to pay the compensation, the capacity of the accused to pay the same and the purpose for which it is directed to be paid etc. must be judged. A fortiori, an enquiry in this behalf, even in a summary way is directed to be conducted. Some reasons, though not elaborate may also have to be assigned while directing to pay compensation.

6. It is true that the above decision came to be rendered not in a case where compensation was awarded under Section 357 (3) Cr.P.C., but in a case where while suspending the sentence under Section 389 Cr.P.C., the lower appellate court had imposed a condition to deposit a huge amount towards the cheque amount. The question of awarding compensation under Section 357(3) Cr.P.C was only incidentally considered in the said decision. Even if, it were to be treated as obtier dicta coming as it does from the Apex Court, it is binding on all the Courts in the Country. But

then, except for a casual statement in the impugned order that the accused is in a financial stringency and involved in a debt trap, no tangible and convincing reasons have been stated by the learned Magistrate for not awarding at least the cheque amount by way of compensation under Section 357(3)Cr.P.C. The direction to undergo default sentence for non payment of compensation under Section 357(3) Cr.P.C also cannot be supported in the light of the recent decision of the Apex Court to the effect that default sentence cannot be imposed while awarding compensation under Section 357(3) Cr.P.C. I am of the view that the learned Magistrate does not appear to have conducted an enquiry as directed by the Apex Court in Kodak Mahindras's case so as to come to a conclusion regarding the quantum of compensation that was awardable in this case. The sentence as well as the direction for payment of compensation do not have convincing reasons to support the same. Accordingly, the judgment of the court below so far as it relates to sentence as well as the direction to pay compensation is set aside and the matter is stand remitted to the Court below for conducting an enquiry regarding the sentence to

be imposed on the accused as well as the quantum of compensation to be awarded to the complainant. Both sides shall be at liberty to address their submissions on these questions. The parties shall appear before the court below without any further notice on 28.12.07.

V. RAMKUMAR, JUDGE

sj

/True Copy/

P.A To Judge